D.T.E. 00-57

Petition of Massachusetts Oilheat Council, Inc. and the Massachusetts Alliance for Fair Competition regarding the VPI Plus 2000 program of Boston Gas Company, Colonial Gas Company and Essex Gas Company

---

APPEARANCES: Usher Fogel, Esquire
Roland, Fogel, Koblenz & Petroccione, LLP
1 Columbia Place
Albany, New York 12207
FOR: MASSACHUSETTS OILHEAT COUNCIL, INC. and MASSACHUSETTS ALLIANCE FOR FAIR COMPETITION
Petitioner

Catherine Nesser
Associate General Counsel
Boston Gas Company
One Beacon Street
Boston, MA 02109
FOR: BOSTON GAS COMPANY
Respondent

I. INTRODUCTION

On June 29, 2000, the Massachusetts Oilheat Council, Inc. ("MOC")[1] and the Massachusetts Alliance for Fair Competition[2] (collectively, the "Petitioners") filed a petition ("Petition") with the Department of Telecommunications and Energy ("Department") requesting that the Department investigate the actions of Boston Gas Company, Colonial Gas Company, and Essex Gas Company (collectively the "Companies") with respect to their Value Plus Installer 2000 ("VPI") program. The Petitioners also request that the Department direct the Companies to suspend their VPI program pending this investigation. On August 10, 2000, the Companies filed a motion to dismiss the petition ("Motion to Dismiss") for its failure to state a claim upon which the requested relief may be granted. On September 6, 2000, the Petitioners filed an opposition to the Motion ("Opposition"); the Companies filed a reply brief ("Reply") on September 21, 2000.

---

[1] MOC is a not-for-profit statewide trade association representing independent marketers, distributors and retailers of petroleum products and energy related services (Petition at 3). MOC is members are engaged in the independent sale and distribution of heating oil and petroleum-based products, and the sale, installation, and repair of heating equipment to residential, commercial, and industrial customers (id.). MOC is members provide these services and products to customers located within the service territories of Boston Gas Company, Colonial Gas Company, and Essex Gas Company (id.).

[2] The Massachusetts Alliance for Fair Competition ("Alliance") is a coalition representing the interests of small businesses engaged in the provision of plumbing, heating, ventilation, and air conditioning ("HVAC") services, and products to residential and commercial customers within the service territories of Boston Gas, Colonial Gas, and Essex Gas (Petition at 3). The Alliance states that its members actively compete in an open and free market (id.).

II. THE COMPANIES' VPI PROGRAM

The Petitioners describe the Companies' VPI program by referring to several of the Companies' own documents, which are attached as exhibits to the Petition (Petition, Exhs. A-C). The Companies do not dispute the Petitioners description of the VPI program and the Department takes as true the Petitioners' description.

Under the VPI program, the Companies enlist installation, service, and repair heating contractors to promote conversions from oil, electric, or propane to gas (Petition at 5). Contractors who join the program receive qualified leads, subsidies for advertising costs, access to training, and promotional incentives (Petition, Exh. A). The program divides the Companies' service territories into thirteen lead distribution areas ("LDA") (Petition, Exh. B).

A. Preferred Contractor Lists

Contractors must execute a Value Plus Installer Agreement and pay the Companies an annual fee of $1,000 for each LDA in which the contractor wishes to receive leads (Petition, Exh. B). In return, the Value Plus Installer Agreement obligates the Companies to schedule customer lead appointments and distribute customer leads to contractors; notify the contractor of the leads; provide updates on VPI statistics and developments; and evaluate the quality of the contractor's work, overall performance, and the customer's satisfaction (Petition, Exh. B). The leads are to be distributed in a "fair and equitable rotation" from a list of preferred contractors for each LDA ("Preferred Contractor List(s)") (Petition, Exh. B).

B. Advertising Program

Under the cooperative advertising program, the Companies provide contractors with a subsidy to offset 50 percent of the cost of advertising through newspapers, direct mail, and other media (Petition, Exh. A at 10). The Companies have established a minimum fund of $500 per contractor and have not set a maximum subsidy (Petition, Exh. A at 9-10). The Companies also provide contractors with Value Plus logos and publication-ready ad slicks so that the contractors' advertising appears similar to that of the Companies (Petition, Exh. A at 9-10). To qualify for the subsidies, however, the contractors' advertising must not merely include the logos, but "must promote the sale of gas products in a significant manner" (Petition, Exh. A at 11).

C. Free Equipment Program

Under the free equipment program, the Companies provide free boilers or furnaces to residential customers who are converting from oil, electric, or propane heat to natural gas (Petition, Exh. A at 4, 8-10). The Companies require a signed contract between the VPI contractor and the customer that specifically indicates that the Companies are providing the equipment for free (id.).

III. POSITIONS OF THE PARTIES

A. The Petitioners

The Petitioners allege that through the VPI program, the Companies are improperly using their monopoly position and assets in an effort to influence and control both the residential heating market as well as the appliance installation, service, and repair market in the

Commonwealth (Petition at 2). The Petitioners contend that the program will detrimentally impact consumers, ratepayers, and small business competitors (id.). The Petitioners argue that, left unchecked, the VPI program, coupled with the utility's free equipment offer, will undermine the consumers' need for an active and vibrant competitive market, and will irreparably harm plumbers and HVAC contractors (id.).

The Petitioners are particularly concerned that the VPI program will unduly and unfairly benefit ServicEdge, the Companies' unregulated affiliate (Petition at 8-10). The Petitioners allege that ServicEdge is the largest provider of HVAC service and equipment installation in the Commonwealth, and therefore, the Petitioners "question" whether ServicEdge will receive the "greatest amount of funds" for free equipment, cooperative advertising, specialty training, market leads, or trade ally attention (id. at 9). The Petitioners argue that a diversion of utility revenue to the affiliate would circumvent the Department's affiliate separation policy (id. at 9-10).

The Petitioners seek specific relief. The Petitioners request (1) an order that the Companies discontinue VPI, including the Free Equipment Program, and (2) an order requiring that any utility promoting conversions "from any energy source" to natural gas be required to provide a payback analysis in its promotions (Petition at 4-5).

B. The Companies

The Companies request that the Department grant their Motion to Dismiss because, they claim, the Petition fails to state a claim upon which the Department may grant relief. The Companies state that, even if all of the Petitioners' allegations of fact are taken as true, the

Petition is deficient because the facts alleged do not support the claims that the VPI program impairs the competitive marketplace, misuses ratepayer funds, and gives a preference to the Companies' affiliates (Memorandum at 3; Reply at 3-5).

The Companies state that the main element of the Petitioners' claim is that the VPI program impairs the competitive marketplace (Memorandum at 3-7). The Companies contend, however, that converting customers from alternative fuels to gas is a legitimate business objective, and that the Department has previously approved other promotional activities similar to the VPI program and free-equipment offers (Memorandum at 3-4).

In response to the Petitioners' claim that the VPI program is a misuse of ratepayer funds, the Companies counter that the Companies are currently operating under ratemaking plans previously approved by the Department (Reply at 3-4). The Companies contend that it would be inappropriate to review the Petitioners' issue concerning the ratemaking treatment because the Companies are not seeking rate treatment for any of the expenses at this time (Reply at 3-4).

Finally, the Companies also state that the Petitioners' concerns regarding the participation of ServicEdge and KeySpan in the VPI Program do not warrant an investigation by the Department (Motion at 12, 14). The Companies claim that the Department has established standards of conduct to govern such relationships and note that the Petitioners are not asserting existing improprieties, only suggesting the potential for such behavior (Reply at 4).

IV. STANDARD OF REVIEW

The Department's Procedural Rule, 220 C.M.R. § 1.06(6)(e), authorizes a party to move for dismissal as to all issues or any issue in a case at any time after the filing of an initial pleading. The Department's current standard for ruling on a motion to dismiss for failure to state a claim upon which relief can be granted was articulated in Riverside Steam & Electric Company, D.P.U. 88-123, at 26-27 (1988).[3] In Riverside at 26-27, the Department denied the respondent's motion to dismiss, finding that it did not appear beyond doubt that the petitioner could prove no set of facts in support of its petition.[4]

In determining whether to grant a motion to dismiss, the Department takes the assertions of fact as true and construes them in favor of the non-moving party. Id. Dismissal will be granted by the Department if it appears that the non-moving party would be entitled to no relief under any statement of facts that could be proven in support of its claim.

V. ANALYSIS

The Petitioners rely on the Department's general supervisory authority under G.L. c. 164, §§ 76 and 76A to request a broad investigation regarding the Companies' VPI

---

[3] Procedures for dismissal and summary judgment properly can be applied by an administrative agency where the pleadings and filings conclusively show that the absence of a hearing could not affect the decision. Massachusetts Outdoor Advertising Counsel v. Outdoor Advertising Board, 9 Mass. App. Ct. 775, 783-786 (1980); Hess and Clark, Div. of Rhodia, Inc. v. Food and Drug Administration, 495 F. 2d 975, 985 (D.C. Cir. 1974).

[4] Although Riverside refers to Massachusetts Rule of Civil Procedure 12(b)(6), the Department has not adopted formally Rule 12(b)(6). See Attorney General v. Department of Public Utilities, 390 Mass. 208, 212-213 (1983) (rules of court do not govern procedure in executive Department).

program (Opposition at 4-5). The Department's general supervisory authority, however, cannot arise from a vacuum. Massachusetts Elec. Co. v. Department of Pub. Utilities, 419 Mass. 239, 246 (1994). Any implied authority to act must arise from statute, regulation, or the Department's overall statutory or regulatory scheme.

A. Market Power

The Petitioners state that their primary concern regarding the VPI program is that the Companies are using their combined market power as regulated gas utilities to engage in practices that may unfairly impact those in the competitive market, including their own ratepayers (Opposition at 8). Specifically, the Complainants claim that: (1) establishing a special contractor list; (2) offering free heating equipment; (3) subsidizing contractor advertising; and (4) interfering in the competitive market for equipment sales and installation service are "manipulative and anti-competitive practices" that will harm competitive energy choice and the heating, ventilation and air conditioning ("HVAC") market (Petition at 27). As grounds for their Petition, the Petitioners rely on the Department's stated "commit[ment] to bringing the benefits of competition to all utility consumers" (Petition at 26).

The Department notes that the Companies do not have a monopoly in the energy-services market, and, therefore, must compete with home-heating oil and other energy providers for the opportunity to serve the needs of customers. Indeed, G.L. c. 164, § 33A specifically permits rate recovery of costs relating to LDC promotional activities that:

> stimulate the use of products or services which are subject to direct competition from products or services or entities not regulated by the [D]epartment or any other governmental agency.

Accordingly, the conversion of customers to gas service is a legitimate business objective of the Companies, and the Department has consistently supported a gas company's efforts to facilitate the use of natural gas and to provide useful information for the benefit of customers through various promotional activities similar to those that are the subject of this Petition. See, e.g., Boston Gas Company, D.P.U. 93-60, at 51-57 (1993) (allowing cost recovery for two rebate programs for customers who install gas air conditioning and gas cogeneration equipment); D.P.U. 93-60, at 164-65 (allowing cost recovery for advertisements that list local plumbing vendors and provide customers with useful information on who to contact for installation of the Company's service); Bay State Gas Company, D.P.U. 92-111, at 201-02 (1992) (acknowledging that a promotional rebate program may be beneficial to ratepayers); Berkshire Gas Company, D.P.U. 90-121, at 133 (1990) (holding that promotional advertising must leave the reasonable impression that a non-regulated energy source is the target of the advertisement in order to qualify for cost recovery). Therefore, the goal of the VPI Program to "spur conversions" from alternative fuels to gas is a legitimate business activity, and the Department is encouraging competition in the market by allowing LDCs to participate.

Furthermore, by claiming that the Companies' VPI programs "impair the competitive market," the Petitioners essentially make an antitrust claim. Even if the facts as alleged supported a claim of antitrust violations, the Department has declined to review such claims, deferring instead to the courts, which are better suited to review commercial claims. Bay State Gas Company, D.P.U. 89-81, at 76-77, 80 (1989). The Department reached this same

conclusion in the context of promulgating standards of conduct regulations to govern affiliate transactions, Standards of Conduct Rulemaking, D.P.U./D.T.E. 97-96, at 24 (1998). The Department stated that it would not presume the existence of utility market power in non-monopoly activities where the costs are not recovered through rates, and that State or Federal antitrust law would be the more appropriate means to redress valid complaints about market power complaints concerning the alleged abuse of market power by utilities in non-monopoly activities (id.). Notably, MOC has acknowledged previously that antitrust determinations must be made by a court of law. Boston Gas Company, D.P.U. 96-50, at 330 (Phase I) (1996) (MOC contended that Boston Gas was engaging in predatory pricing and conceded that this determination will have to be made by a court of law).[5]

Similarly, by complaining that the Companies' VPI advertising misrepresents actual customer savings, the Petitioners essentially make a false advertising claim. Even if the facts as alleged supported a claim of false advertising, the Department has declined to review such claims, deferring instead to the courts under traditional consumer protection statutes and regulations. D.P.U./D.T.E. 97-96, at 23-24.

The Department notes that the Petitioners contend that they are not making antitrust or false advertising claims (Opposition at 5-6). Relabeling claims as "anti-competitive," however,

---

[5] Where the Department has departed from its practice of refraining from investigating claims of anti-competitive behavior, "the anti-competitive action was alleged to be integrally related to the very prices set by the Department in its ratemaking function." Boston Gas Co., D.P.U. 96-50-Phase I, at 249 (1996), citing NET-V-Path, D.P.U. 88-13, at 17 (1988). The Petitioners have not alleged such action, as discussed in Section V.B.

cannot change the tenor and nature of the Petitioners' claims.[6] The Department finds that the essential nature of the Petitioners' allegations constitute antitrust, unfair trade practices, and deceptive advertising claims, no matter what label the Petitioners assign to them. Because these matters are better addressed by other legal forums rather than this regulatory agency, the Department declines to review the claims.

B. Ratepayer Funds

Many of the Petitioners' claims involve the so-called "utilization" or "diversion" of ratepayer funds. There is no basis for Department action, however, on ratemaking issues in the absence of a request for ratemaking treatment or outside the context of a ratemaking proceeding that involves such issues.[7] No costs of the VPI program are currently being charged to ratepayers. Boston Gas operates under a performance-based ratemaking plan approved by the Department. Boston Gas Company, D.P.U. 96-50 (Phase I) (1996). Both Colonial Gas and Essex Gas operate under ten-year rate freezes approved by the Department in

---

6 The Petitioners state the following: that the Companies' use of VPI's preferential contractor program and list "constitutes anti-competitive, if not antitrust, violations" (Petition at 12); that the Companies through their Free Equipment Program exert "incredible market power" (id. at 17; see also id. at 21), engage in a "blatant form of price fixing" (id. at 17), "eliminate competition" (id. at 19; see also id. at 21), and "control[] the wholesale price" of heating equipment (id. at 20); that the Companies in providing VPI participants with advertising funds have "abuse[d] . . . monopoly market power" (id. at 23); that the Companies' merger with KeySpan has increased the Companies' "monopoly market power" (id. at 28); and that consumers must be protected by providing them with a payback analysis so that the Companies' promotional ads "will not mislead consumers into undertaking conversions . . . ." (id. at 30).

7 The Petitioners are not among the class of persons who may file a complaint as to the quality or price of gas sold or delivered. G.L. c. 164, § 93.

Eastern/Colonial Acquisition, D.T.E. 98-128 (1999) and Eastern/Essex Acquisition, D.T.E 98-27 (1998). Those Orders do not include cost recovery for the VPI program. Therefore, the Companies are not improperly using or diverting ratepayer funds recovered through rates for the purpose of the VPI program. Although the types of costs of the VPI Program are similar to the types of costs that the Companies incur for other marketing programs, the Companies are not currently proposing any ratemaking treatment for these costs. The Department notes that any issues involving such a request would be resolved in a future rate proceeding and are not before us in this proceeding.

The Department sets rates based on the costs that the utility demonstrates to be necessary and appropriate in providing utility service to customers. Expenditures associated with marketing programs, such as the VPI Program, represent an appropriate exercise of management discretion in the day-to-day operation of the utility.[8] Whether the Companies may recover such expenditures, however, is a ratemaking issue, which is more appropriate for a future ratemaking proceeding. Because the ratemaking implication of the Companies' expenditures is not an issue appropriate for investigation outside of the context of a ratemaking proceeding, there is no basis for Department action on these claims.

---

8 The Department regulates but does not manage the Companies. See New England Telephone and Telegraph Co. v. Department of Public Utilities, 360 Mass. 443, 466-468, 483-484, 489 (1971) (interference with exercise of judgment by company business management is beyond Department's regulatory power and authority); Mystic Valley Gas Co. v. Department of Public Utilities, 359 Mass. 420, 428 (1971) citing New England Telephone & Telegraph Co. v. Department of Public Utilities, 327 Mass. 81, 90 (1951) (a public regulatory board cannot assume the management of a company and interfere in matters of business detail).

C. Corporate Relationships

The Petitioners also question the Companies' relationship with ServicEdge Partners, Inc. ("ServicEdge") and the KeySpan Corporation ("KeySpan"). The Petitioners allege that the nature of the relationship - that of utility and competitive affiliate - between the Companies and ServicEdge warrants a Department investigation to ensure that the Companies do not divert utility revenues and provide an undue preference to ServicEdge (Petition at 9-10). Similarly, regarding KeySpan, the Petitioners allege that KeySpan's representations that it would undertake shared marketing efforts warrant a Department investigation to determine whether KeySpan and the Companies are diverting utility revenue by improperly sharing information, data, materials, and personnel (Petition at 27-29; Opposition at 7).

As noted by the Petitioners, the Department has encouraged corporate separation as an effective solution to the problem of anti-competitive transactions, and one that requires less regulatory supervision (Petition at 9, citing Letter to Bay State Gas Company, October 25, 1999). ServicEdge is a separate corporate entity within the organization of Eastern Enterprises, and has been a separate corporation for approximately three years. To address the potential for preferential treatment of a competitive affiliate by a utility the Department has promulgated standards of conduct. 220 C.M.R. 12.00 et seq. These standards govern the relationship between ServicEdge and the Companies.

The mere participation of ServicEdge in the VPI program is not enough to sustain a claim that the Companies are in violation of the Department's regulations. The Petitioners do not allege that the Companies have actually violated the standards of conduct, but only that the

"potential" exists for undue preference. This is not a sufficient basis to sustain a complaint about the corporate relationship between the Companies and ServicEdge or to require the Department to open an investigation. None of the facts alleged convince the Department that the framework of the standards of conduct will fail to prevent undue preferences and cross-subsidies.

Moreover, even if the Petitioners had alleged actual violations of the Department's standards of conduct, the Department will not review such allegations before the Petitioners first fulfill their obligation under 220 C.M.R. 12.03(18) to enter into a dispute-resolution procedure with the Companies. Pursuant to 220 C.M.R. 12.03(18), a distribution company's dispute-resolution procedure designates the neutral person responsible for conducting an investigation of complaints alleging violations of the Department's standards of conduct. The Department's regulations require that the neutral person:

> communicate the results of the investigation to the claimant in writing within 30 days after the complaint is received; and require that such communication describe any action taken and notify the complainant of his or her right to complain to the Department **if not satisfied with the results of the investigation** (emphasis added).

220 C.M.R. 12.03(18). The Petitioners have not initiated a dispute-resolution procedure with the Companies. The same reasoning applies to claims regarding KeySpan. Accordingly, the Department finds the Petitioners have failed to identify a legal claim upon which relief could be granted, and to the extent that the standards of conduct could be implicated, the Petitioners have failed to follow required procedures involving dispute resolution with the Companies before filing the Petition with the Department.

VI. CONCLUSION

Based on the foregoing, the Department finds that the Petitioners have failed to state any legal basis to require the Department to open an investigation regarding the Companies' VPI program. Therefore, the Motion to Dismiss must be granted.

VII. ORDER

Accordingly, after due consideration, it is

ORDERED: That the Motion to Dismiss filed by Boston Gas Company, Colonial Gas Company, and Essex Gas Company be and hereby is GRANTED;

ORDERED: That the petition of Massachusetts Oilheat Council, Inc. and the Massachusetts Alliance for Fair Competition be and hereby is DISMISSED.

By Order of the Department,

_____
James Connelly, Chairman

_____
W. Robert Keating, Commissioner

_____
Paul B. Vasington, Commissioner

_____
Eugene J. Sullivan, Jr., Commissioner

_____
Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).